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IN THE

Supreme Court of the United States

October Term, 1962
No. 777

DONALD G. FRANKLIN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

	PAGE
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provision involved	4
Statement of the case	4
Reasons for granting the writ	8
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Berger v. United States, 295 U. S. 78	11
Betts v. Brady, 316 U. S. 455	10
Garner v. Louisiana, 368 U. S. 157	9, 10
Irvin v. Dowd, 366 U. S. 717	10
People v. Leete, 130 Cal. App. 2d 725, 279 P. 2d 769	8
People v. Savage, 15 Cal. App. 2d 72, 59 P. 2d 190	8
Powell v. Wiman, 287 F. 2d 275	11
Rochin v. California, 342 U. S. 165	10, 11
Rogers v. Richmond, 365 U. S. 534	10
Thompson v. City of Louisville, 362 U. S. 199	9
United States ex rel. Sheffield v. Waller, 126 Fed. Supp. 537, cert. den. 224 F. 2d 280	11
United States v. Johnson, 268 U. S. 220	9
Washington v. United States, 357 U. S. 348	10

RULES

Rules of United States Supreme Court, Rule 22(1)	2

STATUTES

California Penal Code, Sec. 954	8
United States Code, Title 28, Sec. 1257(3)	2
United States Code, Title 28, Sec. 2102(d)	2
United States Constitution, Fourteenth Amendment	2, 10
United States Constitution, Fourteenth Amendment, Sec. 1	4

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Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Donald Glen Franklin, respectfully prays for a Writ of Certiorari to the Supreme Court of the United States in order to review the judgment of the Supreme Court of the State of California, entered in the above-entitled case on August 2, 1962, affirming judgment of the Superior Court of the State of California for the County of Orange, adjudging petitioner be put to death.[1]

Citations to Opinions Below.

There was no written opinion in the trial court. The opinion of the court below,[2] printed in Appendix A of

[1]Also sentenced to death at that time were co-defendants, Joseph Rosoto and John Frank Vlahovich.

[2]The certified record of the proceedings below consist of the following: Clerk's Transcript, Volumes I, II and III, pages 1 through 709 (referred to herein as C. T.); Reporter's Transcript,

the Petition of Petitioners Joseph Rosoto and John Frank Vlahovich, is reported in 23 Cal. Rptr. 779, 373 P. 2d 867. Petitioner hereby incorporates the opinion as part of this petition.

The judgment of the court below, in accordance with that court's practice, appears as the last paragraph of its opinion. It reads, "The judgments are affirmed." (Appendix A of Petitioners Rosoto and Vlahovich's petition).

Jurisdiction.

The judgment of the Supreme Court of California was entered on August 2, 1962. Rehearing was denied on August 29, 1962. The jurisdiction of this Court is involved under 28 U. S. C. 1257(3) and 2102(d) and Rule 22(1) of this Court.

Question Presented.

Whether the rulings of the court below resulted in a proceeding in which petitioner was denied a fair trial and due process of law guaranteed by the Fourteenth Amendment in that:

1. The court's refusal to grant severance of trial to petitioner Franklin was wrong-doing of the gravest nature, in that petitioner was charged in only two of the nine counts, and his defense was severely prejudiced as a result of the joint trial.

Volumes 28 through 63, pages 1 through 4252, plus volume labeled "Indes" (referred to herein as R. T.); various exhibits, and one bound packet containing separate Opening Briefs of petitioners; 2 volumes of respondents' brief, a reply brief for Vlahovich, Petition for Rehearing on behalf of each petitioner, an Answer to Petitions for Rehearing, Declarations and Applications for Stays of Execution, and the Order Denying Rehearing. (The bound packet will be referred to as Bound Packet.) There are also Reporter's Transcript of hearings held on April 15, 29, and May 26, 1960.

2. The court denied petitioner the right to have stricken certain references made about him in taped recordings and telephone conversations concerning criminal activity which bore no logical relationship to the crime charged nor to petitioner's involvement in such criminal activity, but which only served to overwhelm and inflame the jury with evidence of petitioner's alleged bad character.

3. The court denied petitioner his rights upon cross-examination by allowing cross-examination upon matters untouched on direct, thereby permitting the expansion of the prosecution's evidence to make it applicable to petitioner.

4. The court permitted considerable hearsay evidence which evidence could not be verified concerning petitioner, thereby causing the jury to be influenced to such an extent that they found petitioner guilty even though he never was identified as being present at the scene of the crime.

5. The court permitted admission of hearsay evidence from the prosecution's principal witness concerning petitioner in spite of the fact that the witness was known to bear animosity towards petitioner because petitioner had "beat him up".

6. The court permitted the conviction of petitioner upon testimony directed against his co-defendants, in that the great mass of testimony which was directed at Vlahovich and Rosoto became a millstone to petitioner's defense, dragging him down by the weight of implication.

Constitutional Provision Involved.

United States Constitution, Fourteenth Amendment, Section 1, provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Statement of the Case.

This is a most strange case where petitioner was convicted of murder and sentenced to death along with two co-defendants, Joseph Rosoto and John Frank Vlahovich, but where the supposed triggerman in the murder, according to the prosecution's theory, has never been charged, tried or convicted and still walks the streets a free man; where all the evidence against petitioner was circumstantial and was related mainly by criminals who were themselves charged with crimes at the time of their testimony; where the evidence was admittedly weak; and where the prosecution, to make up for the weakness of its evidence, spent most of the trial in an attempt to degrade and destroy the character of petitioner so that the jury would bring in convictions.

Petitioner, along with Rosoto and Vlahovich, was charged in Count VI of a nine count indictment [C. T. 4-20] with the murder of one Leslie Simpson. The murder resulted under the following circumstances: On March 9, 1957, a robbery occurred at the South Seas Restaurant in Anaheim, California, shortly after it closed at 2 A.M. Participating in the robbery were Joseph Rosoto, his half-brother Michael Rosoto (here-

inafter referred to as "Michael"), Thomas Jenkyn, Warren Bruce Larson and Louis Suboter. Leslie Simpson was the owner of the bar, and he, along with Fern Vanatta (who later became Mrs. Simpson) and three other persons, Howe Welch and Allen, were robbed. Rosoto was charged with the armed robbery of Leslie Simpson, Howe and Allen. After Leslie Simpson had testified at the preliminary hearing, he was shot and killed on February 7, 1959. Subsequently, and on April 20, 1959, Rosoto went on trial for the armed robbery and was acquitted.

Thereafter, the present proceeding was commenced on April 7, 1960, with the aforementioned indictment.

Petitioner contends that they did not participate in the event and was not present at the time of the murder. He offered evidence of alibis.

The prosecution's theory was that petitigner, Vlahovich, and the alleged triggerman Ralph Wesley Johnson murdered Leslie Simpson, for and on behalf of Rosoto, to prevent Leslie Simpson from testifying at the robbery trial of Rosoto then set for April 20, 1959.

The verdicts of the jury, of course, establis es that the jury did not credit the alibi witnesses of petitioner that he was not present at the scene of the murder and that he was some place else. However, there was no direct evidence from eyewitnesses or physical evidence that petitioner committed the murder. And but for the errors complained of here, the jury may well have gone the other way.

The evidence concerning petitioner on the murder count consisted of the following:

The prosecution's principal witness, Michael Rosoto, testified that petitioner Franklin had told him that he had flown to Los Angeles with a Ralph Johnson, where they were met by Vlahovich, had a few drinks, went out to "this guy's house", and that Johnson had then killed the man.

Another witness for the prosecution, Barbara Hale, testified that Franklin had told her that he "had taken care of it for Joe". She further testified that she had heard Franklin bragging about things he had "gotten away with", one instance being the shooting and killing of a man in California, which he had done for Rosoto who had paid him for it.

Sum and substance, that is the evidence "directly" linking Franklin with the murder. Or, as the court aptly states it, ". . . without Franklin's admissions to Michael and Barbara, the People had no case." (23 Cal. Rptr. at 806, 373 P. 2d at 894.)

Indirect evidence, however, was used to advantage by the prosecution. Franklin was mentioned in a tape recording of a conversation between Michael and co-defendant Rosoto. Franklin asked that references to him be stricken, but the court merely admonished the jury that statements in his absence were not evidence against him.

Franklin was also mentioned in a telephone conversation between the same parties. The court refused to

strike these references upon Franklin's motion because there was nothing in the conversation that Franklin had engaged in any criminal activity or was about to do so.

The cross-examination of Franklin, even though it delved into matter not actually brought out on direct, only brought out the fact that Franklin *knew* Rosoto.

There was no evidence placing Franklin at the scene of the murder, except the hearsay statements of Michael, who held a grudge against Franklin, and Barbara Hale, who was at the scene of the alleged conversation only upon her own testimony.

In essence, petitioner Franklin was either convicted of murder on hearsay testimony or else the testimony was so massive against his co-defendants that he was found guilty by implication. So bared, the conviction stands, nakedly unfair, stripped of due process, demanding a man's life upon the weakest of grounds.

REASONS FOR GRANTING THE WRIT.

I.

The Denial of Petitioner's Motion for a Severance of Trial Was a Denial of Due Process.

Under §954 of the California Penal Code, the trial court has the right to order separate trial to avoid prejudice arising from admission of evidence against a co-defendant.

People v. Savage, 15 Cal. App. 2d 72, 59 P. 2d 190.

And its decision will not be reversed on appeal unless there has been an abuse of discretion.

People v. Leete, 130 Cal. App. 2d 725, 279 P. 2d 769.

Petitioner submits that in this case there was an abuse of discretion.

Petitioner was indicted on only two of the nine count information. He was implicated in criminal activity by his association with the co-defendants and by references about him in testimony directed towards them.

By far the greater part of the prosecution's testimony in this case was directed against petitioner's co-defendants. Petitioner was carried along by the current, which sought to bring out past misdeeds, violent tendencies, and the ignoble characters of his co-defendants.

Petitioner was broadly cross-examined in an effort to expand prosecution's evidence against petitioner's co-defendants, so that it would be applicable to him.

The cumulative effect of testimony damaging to petitioner's co-defendants during the trial which lasted

over four months is evidenced by the fact that petitioner was also found guilty, though he was never identified as being at the scene of the crime, and the evidence against him was no more than hearsay.

Petitioner submits that a denial of the severance of trial inured to his great detriment and prevented him from receiving due process.

II.

The Conviction of Petition Upon Insufficient Evidence Was a Denial of Due Process.

"It is recognized that the Supreme Court does not usually grant certiorari to review evidence and discuss specific facts."

United States v. Johnson, 268 U. S. 220, 227.

However, the court has granted certiorari to review matters of evidence in cases where the deciding court below seems to it to be shockingly wrong and thus to prevent substantial due process questions. In *Thompson v. City of Louisville*, the Court stated that the ultimate question presented was whether the loitering and disorderly conduct charges against petitioner "were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment", and that the deciding of this question "turns not on the sufficiency of the end; but on whether this conviction rests upon any evidence at all."

Thompson v. City of Louisville, 362 U. S. 199.

Similarly, in *Garner v. Louisiana*, the state court convictions for disturbance of the peace were reviewed and reversed because they were "so totally devoid of evi-

dentiary support as to render them unconstitutional under the due process clause of the Fourteenth Amendment."

Garner v. Louisiana, 368 U. S. 157, 163.

In *Washington v. U. S.*, a federal conviction was reversed without elaboration "because of the insufficiency of the evidence."

Washington v. United States, 357 U. S. 348.

Petitioner submits that the decision of the court below that found him guilty of murder without placing him at the scene, by the use of hearsay statements made by witnesses who were not heretofore "known" for their veracity is patently unfair, and is such a case where charges are so shakingly supported as to result in a denial of due process, and such conviction is thereby unconstitutional under the due process clause of the Fourteenth Amendment.

III.

The Cumulative Effect of the Above Assigned Errors Resulted in a Denial of a Fair Trial and Due Process of Law.

A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment.

Rogers v. Richmond, 365 U. S. 534, 544-545;
Irvin v. Dowd, 366 U. S. 717.

An asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case.

Betts v. Brady, 316 U. S. 455, 462;
Rochin v. California, 342 U. S. 165.

Where the totality of all the facts creates a trial attended "by such fundamental unfairness as to amount to a denial of due process of law," the judgment must be upset.

Powell v. Wiman, 287 F. 2d 275, 281 (C. A. 5);

United States ex rel. Sheffield v. Waller, 126 F. Supp. 537, 545-546, c.d. 224 F. 2d 280 (C. A. 5).

This is a case where the petitioner Franklin—and the jury—were overwhelmed by evidence of other crimes of other people placing the petitioner in an evil light by association; where much of the evidence was introduced in a manner to deny petitioner effective cross-examination; where the petitioner was the victim of the prosecution's zeal for conviction. It is

> "a case where the misconduct of the prosecuting attorney was (not) slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

Berger v. United States, 295 U. S. 78, 89.

It is a case in which this Court's observation in *Rochin v. California*, 342 U. S. 165, 169, is equally applicable here:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to

ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'"

In the light of the record in this case, the exercise of this Court's judgment is called for.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PAUL CARUSO,

Attorney for Petitioner Donald G. Franklin.

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Appendix I to Be Attached to Petition for Writ of Certiorari to the Supreme Court of the State of California.

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APPENDIX I.

Opinion of the Supreme Court of the State of California.

[Crim. No. 6862. In Bank. Aug. 2, 1962.]

The People of the State of California, Plaintiff and Respondent, v. Joseph Rosoto, John Frank Vlahovich and Donald Glen Franklin, Defendants and Appellants.

Appeals, automatically taken under Pen. Code, §1239, subd. (b), from judgments of the Superior Court of Orange County. Kenneth E. Morrison, Judge. Affirmed.

Prosecution for murder, conspiracy to commit burglary and robbery, burglary, kidnaping with intent to commit robbery, perjury and conspiracy to obstruct and pervert justice. Judgments of conviction imposing the death penalty on each defendant on the murder counts, affirmed.

A. L. Wirin, Paul M. Posner, Samuel Dreizen and Robert L. Corfman, under appointment by the Supreme Court, and Rice & Rice, David Rice and Samuel K. Rice for Defendants and Appellants.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, and Gordon Ringer, Deputy Attorney General, for Plaintiff and Respondent.

McComb, *J.*—These are automatic appeals from judgments of guilty of murder in the first degree setting the penalty at death.

On March 9, 1957, shortly after it was closed at 2 a.m., the bar of the South Seas Restaurant in Anaheim, California, was robbed by armed bandits. Defendant Rosoto (hereinafter referred to as "Rosoto"),